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No. 85-1360

In the Supreme Court of the United States

OCTOBER TERM, 1985

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, and LOCAL 759 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, SYSTEM COUNCIL U-4,

Petitioners,

v.

SALLY HECHLER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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20 pp

QUESTION PRESENTED

Does §301 of the Labor Management Relations Act of 1947, 29 U.S.C. §185, under the Supreme Court's decision in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. ....., 105 S. Ct. 1904, 85 L. Ed.2d 206 (1985), pre-empt a state-law tort action for the negligent performance by a union of a duty to an individual worker prescribed by the collective bargaining agreement?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The respondent, Sally Hechler, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the decision of the United States Court of Appeals for the Eleventh Circuit in this case. That decision is reported at 772 F.2d 788 (1985), and is reprinted in the Petitioners' appendix at Pet. 11a.

ARGUMENT

Although the Unions present two questions to the Court—invoking the pre-emptive force of both §301 and of their statutory duty of fair representation, *see Vaca v. Sipes*, 386 U.S. 171, 177 (1967)—they later disclaim any contention "that the Eleventh Circuit's . . . conclu-

sion with respect to the preemptive force of the duty of fair representation . . . presents a question that is independently worthy of this Court's attention" (Pet. 11 n.3). For this reason, we need not defend here the Court of Appeals' rejection of the Unions' defense of pre-emption by the duty of fair representation, but will confine our discussion to the Unions' defense of pre-emption under §301.[1]

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1. This is not to concede the Unions' argument (Pet. 10-11 n.3) that the Court of Appeals erred in holding that Hechler's state action only peripherally implicated the central concern of the labor laws with the relationship between an employer and its employees collectively, because Hechler's complaint challenged not the general safety of the workplace—a matter at the heart of the bargaining relationship between the employer and the union—but only the Unions' failure to protect her individual safety in work assignment—a matter "between the union and the worker [that] does not implicate national labor policy" (Pet. 31a; *see* Pet. 25a n.3, 29a). Although this distinction is easily defensible, we need not debate here the Unions' rejoinder (Pet. 10 n.3), both because the point is not offered as a basis for certiorari, and because it is only one of many upon which the Court of Appeals rejected the Unions' defense of pre-emption by the duty of fair representation.

Among the other bases for that conclusion are 1) that the Unions' negligent conduct was neither prohibited nor protected by the labor laws; 2) that Congress did not intend that conduct which is tortious under state law should be unregulated in the absence of any specific federal prohibition; 3) that Hechler's state claim was only peripherally related to the purposes of federal labor law, primarily because the federal scheme afforded Hechler no practical means of redressing her injury; and 4) that Florida has an obvious interest in redressing common-law negligence. *See generally Belknap, Inc. v. Hale*, 463 U.S. 491, 498-99, 511-12 (1983); *Sears-Roebuck and Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 188 nn.12, 13, 193-94, 196 n.25, 199 n.30, 200, 206-07 (1978); *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290, 298-305 (1977); *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976); *Linn v. Plant Guard Workers of America*, 383 U.S. 53, 60, 63-64 (1966); *Local 20, Teamsters Union v. Morton*, 377 U.S. 252 (1964); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246-48 (1959); *International Union, UAA v. Russell*, 356 U.S. 634, 643, 645-46 (1958); *United States Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656, 663-68 (1954).

1. The Court of Appeals' Decision in This Case Does Not Conflict With This Court's Decision in Allis-Chalmers Corp. v. Lueck, 471 U.S. ....., 105 S. Ct. 1904, 85 L. Ed.2d 206 (1985).

Allis-Chalmers does not hold that every state-law claim which depends to some extent upon the duties prescribed in a collective bargaining agreement is pre-empted by §301 of the LMRA. To the contrary, *Allis-Chalmers* readily supports the Court of Appeals' decision in this case, for three independent reasons.

First, *Allis-Chalmers* is consistent with the Court's longstanding practice of administering the pre-emption doctrine in the light of any practical potential for conflict between the state and federal systems—not of theoretical possibilities. The central objective of *Allis-Chalmers* is the uniform interpretation of a given labor contract under a single body of law, as against the possibility of conflicting interpretations in the state and federal systems.[2] Thus, 85 L. Ed.2d at 213-14, *Allis-Chalmers* quotes with approval the Court's earlier pronouncement that state regulation is permissible "unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the states." *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978). In addition, 85 L. Ed.2d at 214, it quotes with approval the observation in *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962), that "substantive principles of federal law must be paramount *in the area covered by the statute* [so that] issues raised

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2. 85 L. Ed.2d at 214-15, *quoting Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103-04 (1962). *Accord, Republic Steel Corp. v. Maddox*, 379 U.S. 650, 657 (1965); *Smith v. Evening News Association*, 371 U.S. 195, 200-01 (1962).

in suits *of a kind covered by §301* [are] to be decided according to the precepts of federal labor policy" (our emphasis). These statements counsel a real-world consideration of the extent to which the state-court adjudication of a question would create the possibility of inconsistent outcomes in the federal system.[3]

In the instant case, as the Court of Appeals found, "[n]either the collective bargaining agreement nor §301 provides a remedy" (Pet. 21a). Hechler's claim is that the Unions were negligent in the performance of a contractual obligation, causing personal injury and damages in tort. Although Hechler might theoretically have brought a §301 action for breach of contract, the reality is that she suffered no contract damages, and thus would not have considered wasting her time to bring such an action. Nor is there any realistic danger of a federal-court interpretation of the contract clause at issue in any other context. As the Unions have admitted throughout these proceedings, the collective-bargaining agreement in question does not provide a grievance or arbitration procedure through which an individual worker like Sally Hechler might challenge her work assignment or training.

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3. *See Strachan v. Union Oil Co.*, 768 F.2d 703, 705 (5th Cir. 1985) (reading *Allis-Chalmers* to hold that plaintiffs cannot employ a tort claim "in substitution for their rights under the collective bargaining agreement"). For analogous reasoning in other labor-law pre-emption contexts, *see De Veau v. Braisted*, 363 U.S. 144, 152 (1960) (plurality opinion) ("Would Congress, with a lively regard for its own federal labor policy, find in this state enactment a true, real frustration, however dialectically plausible, of that policy?"), *quoted in Brown v. Hotel and Restaurant Employees*, 468 U.S. ....., 104 S.Ct. 3179, 82 L. Ed.2d 373, 387 (1984); *Sears-Roebuck and Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 201 (1978) (the question is not whether it is "theoretically possible" that an issue may be decided in two forums, but whether there is "in fact" a "risk of overlapping jurisdiction"). As the Court acknowledged in *Allis-Chalmers*, 85 L. Ed.2d at 216 n.6, such cases at least "involve[] considerations related to . . . those at issue here."

Compare *Allis-Chalmers,* 85 L. Ed.2d at 210, 212, in which the plaintiff did have a grievance procedure available, but chose not to invoke it. In addition, as both parties have acknowledged throughout, Hechler has no claim that the Unions breached their duties of fair representation, in the absence of any evidence of arbitrary or discriminatory conduct by the Unions.[4]

As in *De Veau v. Braisted, supra* note 3, the appropriate question is whether the mere theoretical availability of such a §301 suit, "however dialectically plausible," constitutes a sufficiently "true, real frustration" to imply a Congressional intention to pre-empt. The *Allis-Chalmers* opinion acknowledges the propriety of that question, and thus of its consideration by the Court of Appeals in this case. For this reason, there is no conflict with *Allis-Chalmers,* even if the Court of Appeals in this case may have answered that question incorrectly, which of course we dispute.

Second, the *Allis-Chalmers* decision acknowledges the delicate balance between state and federal interests,[5] in holding *not* that "every state-law suit asserting a right that relates in some way to a provision in a collective-bargaining agreement, or more generally to the parties to such an agreement, necessarily is pre-empted by §301," but that pre-emption is appropriate only "when resolution of a

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4. *See Vaca v. Sipes,* 386 U.S. 171, 190 (1967). For the same reason, Hechler had no administrative remedy before the NLRB. *See International Union, UAW v. Hinz,* 218 F.2d 664, 665 (6th Cir. 1955) (per curiam).

5. *See generally Bill Johnson's Restaurants, Inc. v. NLRB,* 461 U.S. 731, 741-42 (1983); *Sears-Roebuck & Co. v. San Diego County District Council of Carpenters,* 436 U.S. 180, 196 n.25 (1978); *Farmer v. United Brotherhood of Carpenters,* 430 U.S. 290, 304 (1977).

state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract . . . ." 85 L. Ed.2d at 221. As a way of administering this test of substantial dependency—of determining which state-law claims are sufficiently rooted in fundamental state policies to survive pre-emption—the *Allis-Chalmers* decision focuses on the extent to which the state cause of action may be waived or modified by the collective-bargaining contract, 85 L. Ed.2d at 215-16, 218, 219 & n.11:

> Of course, not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by §301 or other provisions of the federal labor law. Section 301 on its face says nothing about the substance of what private parties may agree to in a labor contract. Nor is there any suggestion that Congress, in adopting §301, wished to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation. Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored. Clearly, §301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law. In extending the pre-emptive effect of §301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.

Therefore, state-law rights and obligations that do not exist independently of private agreements, and

that as a result can be waived or altered by agreement of private parties, are pre-empted by those agreements. . . . Our analysis must focus, then, on whether the Wisconsin tort action for breach of the duty of good faith as applied here confers non-negotiable state law rights on employers or employees independent of any right established by contract, or, instead, whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the contract.

* * *

[I]f the arbitrator ruled that the labor agreement did *not* provide such relief expressly or by implication, that too should end the dispute, for under Wisconsin law there is nothing that suggests that it is not within the power of the parties to determine what would constitute "reasonable" performance of their obligations under an insurance contract.

* * *

[T]here is no indication in Wisconsin law that the tort is anything more than a way to plead a certain kind of contract violation in tort in order to recover exemplary damages not otherwise available under Wisconsin law. . . . Therefore, under Wisconsin law it appears that the parties to an insurance contract are free to bargain about what "reasonable" performance of their contract obligation entails. That being so, this tort claim is firmly rooted in the expectations of the parties that must be evaluated by federal contract law.

* * *

We pass no judgment on whether an independent, non-negotiable, state-imposed duty which does not create

similar problems of contract interpretation would be pre-empted under similar circumstances.[6]

In *Allis-Chalmers,* the state bad-faith claim was wholly dependent—not only for its scope but for its very existence—upon the terms of the contract. As the Court stated directly, 85 L. Ed.2d at 219, the tort claim was nothing "more than a way to plead a certain kind of contract violation . . . ." *See id.* at 220 n.12. Thus, the state-law claim could be "waived or altered by agreement," 85 L. Ed.2d at 216—for example, by prescribing rules concerning the speed with which, or the manner in which, insurance claims might be processed. As in *Local 174, Teamsters v. Lucas Flour Co.,* 369 U.S. 95, 104 (1962), "[w]hether [the defendant's conduct] was a violation of the collective bargaining contract is thus the ultimate issue which this case presents."

The instant case is different. In this case, as the Court of Appeals found (Pet. 21a), "[t]hough the contract may be of use in defining the scope of the duty owed, liability will turn on basic negligence principles as developed by state law." Although the contract in question admittedly defines the nature and scope of the

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6. *See also Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 50, 52 (1974), *quoted in Allis-Chalmers,* 85 L. Ed.2d at 216 n.8. The Court noted in *Alexander*: "Where the statutory right underlying a particular claim may not be abridged by contractual agreement, the Court has recognized that consideration of the claim by the arbitrator as a contractual dispute under the collective-bargaining agreement does not preclude subsequent consideration of the claim by the National Labor Relations Board as an unfair labor practice charge or as a petition for clarification of the union's representation certificate under the Act." The Court added: "Both rights have legally independent origins and are equally available to the aggrieved employee."

Unions' duties,[7] it does not, and cannot, abrogate the Unions' independent state-law obligation to perform those duties in a reasonable way. The contract can *define* what is reasonable, but it cannot *absolve* what it defines as unreasonable. That obligation exists independent of the contract—no matter what duties the contract prescribes—and by definition cannot be abrogated by contract.

As the Court of Appeals recognized in this case, that is the dispositive difference: "[T]he fact that some deference to a collective bargaining agreement must be made in order to define the scope of the union's duty does not automatically lead to the conclusion that a suit in negligence must be interpreted as no more than a §301 action and therefore is preempted." The *Allis-Chalmers* decision is consistent with that conclusion, in acknowledging that pre-emption is inappropriate if the state action exists "independently of private agreements," and cannot "be waived or altered by agreement of private parties . . . ." 85 L. Ed. 2d at 216. That is precisely the case here. Although the nature and scope of the Unions' duties are defined by the contract, that agreement does not and cannot abrogate independent state-law duties to perform those obligations

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7. Florida recognizes a common-law duty to exercise reasonable care in the performance of an express or implied contract. *Schauer v. Blair Construction Co.*, 374 So.2d 1160 (Fla. 4th DCA 1979). *See Robertson v. Deak Perera (Miami), Inc.*, 396 So.2d 749 (Fla. 3rd DCA), *review denied*, 407 So.2d 1105 (Fla. 1981). The violation of such a duty gives the plaintiff an election to proceed in tort or in contract. *Holbrook v. Sarasota*, 58 So.2d 862 (Fla. 1952). If negligence is the gravamen of the cause of action, then the action is treated as an action in tort, and the contract is significant only because it created the legal duty assertedly breached. *Banfield v. Addington*, 104 Fla. 661, 140 So. 893 (1932); *Gallichio v. Corporate Group Service, Inc.*, 227 So.2d 519 (Fla. 3rd DCA 1969). *See generally Helton v. Hake*, 386 F. Supp. 1027, 1033 (W.D. Mo. 1974); *Helton v. Hake*, 564 S.W.2d 313, 317 (Mo. Ct. App.), *cert. denied*, 439 U.S. 959 (1978).

in a non-negligent way. The instant case is perfectly consistent with *Allis-Chalmers*. *See Muenchow v. Parker Pen Co.*, 615 F. Supp. 1405, 1414-15 (W.D. Wisc. 1985).

Third, *Allis-Chalmers* concludes that "[p]erhaps the most harmful aspect" of permitting the state action is that it would have adjudicated the dispute "without first exhausting the grievance procedures established in the bargaining agreement." 85 L. Ed.2d at 220. Thus, only "[the] result [in *Allis-Chalmers*] preserves the central role of arbitration in our 'system of industrial self-government.'" *Id., quoting Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960).[8]

In this case, as the Unions have acknowledged throughout, and as the Court of Appeals found, the collective bargaining agreement provided Hechler no grievance procedure, no arbitration procedure, and no means of redress:

> Moreover, the collective bargaining contract in [*Allis-Chalmers*] itself provided the remedy—arbitration—for a breach. Here, the plaintiff's claim is essentially

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8. *See Bowen v. United States Postal Service*, 459 U.S. 212, 225 (1983); *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 105 (1962). A number of cases decided since *Allis-Chalmers* rely upon this factor. *See, e.g., Hillard v. Dobelman*, 774 F.2d 886, 887 (8th Cir. 1985); *Lancaster v. Norfolk and Western R. Co.*, 773 F.2d 807, 816 (7th Cir. 1985) (attributing to *Allis-Chalmers* the holding that "[w]here, as is true of over 90% of such contracts, the contract establishes a grievance and arbitration remedy, that remedy becomes by force of section 301 exclusive, just like the arbitral remedies established by the Railway Labor Act"); *Mitchel v. Pepsi-Cola Bottlers, Inc.*, 772 F.2d 342, 345 (7th Cir. 1985); *Strachan v. Union Oil Co.*, 768 F.2d 703, 705 (5th Cir. 1985); *Nicholson v. Amalgamated Life Ins. Co.*, 616 F. Supp. 318, 319 (S.D. Miss. 1985); *Muenchow v. Parker Pen Co.*, 615 F. Supp. 1405, 1410 (W.D. Wisc. 1985); *Malone v. Kitchens of Sara Lee*, 613 F. Supp. 1074, 1075 (N.D. Ill. 1985); *Johnson v. Hussman Corp.*, 610 F. Supp. 757, 758 (E.D. Mo. 1985); *Cavins v. Aetna Life Ins. Co.*, 609 F. Supp. 309, 313 (E.D. Wisc. 1985); *Marine Transport Lines, Inc.*, 609 F. Supp. 282, 287 (S.D.N.Y. 1985).

one of common law negligence for breach of a duty of care. Neither the collective bargaining agreement nor §301 provides a remedy (Pet. 21a).

In concluding the the plaintiff's ability to circumvent contracted-for arbitration procedures was "[p]erhaps the most harmful aspect" of permitting the state action, the *Allis-Chalmers* opinion does not suggest what the outcome would have been in the absence of such available procedures. As we have noted, the central inquiry is whether the state adjudication creates a realistic threat of inconsistent contractual interpretations in alternative forums. In the absence of an available grievance procedure in the federal system, such a possibility is remote. Nothing in *Allis-Chalmers* suggests otherwise, and thus the Court of Appeals' decision in this case does not conflict.

2. The Court of Appeals' Decision in This Case Does Not Conflict With the Decision in Michigan Mutual Ins. Co. v. United Steelworkers of America, 774 F.2d 104 (6th Cir. 1985) (per curiam).

Unlike the instant case, *Michigan Mutual* did not involve a claim that the union had breached a contractual duty owed to an individual employee—for example, to insure that he was properly trained for the job to which he was assigned, or assigned to a job for which he was properly trained. To the contrary, *Michigan Mutual* involved the asserted breach of a contractual duty owed to *all* of the union members—"to provide safety services to its members." 774 F.2d at 104. Thus, the complaint charged not that the union had failed to accommodate the needs of a specific worker, but rather that "it had failed, as exclusive bargaining representative for [the company's] employees, to require [the company] to re-

move the shanty, allegedly a known hazardous condition, from the plant." *Id.* at 105.

In the instant case, the Court of Appeals expressly acknowledged this distinction, reserving for another day the question of whether pre-emption might be appropriate in a case such as *Michigan Mutual* (Pet. 29a, 31a):

> This case is distinguishable from the cases previously described in which the plaintiff sought relief from the union for a breach of its general duty to inspect for safety for the benefit of the entire work force in the workplace pursuant to the collective bargaining agreement. . . . In the present case the plaintiff alleges a duty running from the union to her individually that required the union to assure that she was first qualified to work in a dangerous substation on the job assigned to her prior to her assignment. The plaintiff does not claim the union was responsible for making the substation safe for all of the workers.
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> * * *
>
> [W]e have previously pointed out the distinction between this case which does not claim the union is responsible for the safety of the workplace and those cases which do. This case cannot be said to intrude upon federal labor policy. The history of the development of craft workers has involved training of apprentices, promotions to journeymen and then to craftsmen based on experience and expertise. Unions have protected seniority and differential wage rates based on this system. In this case the union is charged with the responsibility of assuring that the worker can cope with the dangers inherent in the workplace. The undertaking of this responsibility is

between the union and the worker and does not implicate national labor policy.

The Unions or the Court might disagree with this purported distinction between the instant case and cases like *Michigan Mutual*. The relevant point, however, is that the Court of Appeals in this case expressly reserved for another day its resolution of cases like *Michigan Mutual*, and thus the two cases cannot be in conflict.[9]

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9. It might be argued that the Court of Appeals drew this distinction only in rejecting the defense of pre-emption by the duty of fair representation—which requires a balancing of all relevant interests, including the relative importance of the issue to the central objectives of the labor laws—but did not purport to accept such a distinction in rejecting the defense of pre-emption under §301. We acknowledge the difference between the two defenses, *see Allis-Chalmers*, 85 L. Ed.2d at 217 n.9, but as we have noted, §301 pre-emption also requires a determination of the practical likelihood of conflicting interpretations in the state and federal systems, and thus of a Congressional intention to pre-empt. *See Id.* at 213-14, *quoting Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978). In this context, the Court of Appeals' distinction—between a case on the one hand in which the union might invoke §301 to seek *preventive* relief on behalf of its membership to insure the safety of the workplace, and on the other hand a case like this one, in which a single worker seeks *remedial* relief after suffering an injury—becomes meaningful. In the fair-representation context, this Court repeatedly has emphasized that even if the plaintiff had a preventive federal remedy before suffering an injury, that recognition does not alone preclude a state action for redress of injury already incurred. *See Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 742 (1983), *citing Linn v. Plant Guard Workers*, 383 U.S. 53, 63 (1966); *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290, 298 (1977). In light of the foregoing, the same distinction seems equally available in opposing a defense of pre-emption under §301. For this reason, there is at least a significant question whether the Court of Appeals which decided the instant case would agree with the outcome of *Michigan Mutual* under analogous facts.

3. Even if the Court of Appeals' Decision in This Case Did Conflict With Michigan Mutual, That Would Not Provide a Sufficient Basis for Review by This Court.

The Unions appear to assume that the mere demonstration of a two-circuit conflict is sufficient to warrant review by this Court. Thus, the Unions make no attempt to demonstrate that any other circuits have spoken to the question at issue, that the asserted two-circuit conflict presents an opportunity for forum shopping, or that the instant decision is otherwise appropriate for review by this Court. They thus ignore the fact that this Court denies certiorari in the vast majority of cases presented which reflect a two-circuit conflict.[10]

Whether one applauds or laments the Court's inability to resolve all two-circuit conflicts, it is an unavoidable reality that choices must be made, and the Unions have failed at the threshold to offer any persuasive reason for acceptance of certiorari by this Court. To the contrary, since the asserted two-circuit conflict concerns the interpretation of a very-recent (1985) decision by this Court, and since only two circuits have purportedly interpreted that decision in the particular context at issue here, it would seem that the arguments for percolation—for additional input by other courts which might induce one or the other of the assertedly-conflicting courts to

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10. *See Brown Transport Corp. v. Atcon, Inc.*, 439 U.S. 1014 (1978) (White, J., dissenting from the denial of certiorari); Report of Commission on Revision of the Federal Court Appellate System, 67 F.R.D. 195 (1975) (appendix); Estreicher & Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Emperical Study*, 59 N.Y.U. L. Rev. 681, 784-87 (1984); Note, *Identification, Tolerability, and Resolution of Intercircuit Conflicts: Reexamining Professor Feeney's Study of Conflicts in Federal Laws*, 59 N.Y.U. L. Rev. 1007, 1007-08 (1984).

rethink its position—are particularly strong.[11] The Unions have suggested no countervailing detriment to the tolerance of such a period of percolation—like the threat of forum shopping—and we can imagine none. In light of the many two-circuit conflicts which this Court must decline to review, the Unions have offered no compelling reason for the Court to resolve the conflict asserted here.[12]

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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11. *See Estreicher & Sexton, supra,* 59 N.Y.U. L. Rev. at 725-27; Note, *supra,* 59 N.Y.U. L. Rev. at 1019-21, 1025-27.

12. Finally, we respectfully submit that in light of the foregoing arguments, if the Court of Appeals' decision in this case does conflict with *Michigan Mutual,* it seems clear that the Court of Appeals' decision constitutes the correct and appropriate interpretation of *Allis-Chalmers*—and thus that the *Michigan Mutual* decision is erroneous. For this reason, although it might at some point be advisable for the Court to resolve the asserted conflict, this case is not the appropriate vehicle. It would be more appropriate for this Court to accept review of the *Michigan Mutual* decision, should the parties seek such review.